

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

LOCAL 8027, AFT-NEW HAMPSHIRE, AFL-CIO, RYAN )  
RICHMAN, JOHN DUBE and JOCEYLN MERRILL, )  
teachers in the New Hampshire Public Schools, and )  
KIMBERLY GREEN ELLIOTT and MEGHAN EVELYN )  
DURDEN, parents or guardians of children in the New )  
Hampshire public schools. )

Plaintiffs, )

v. )

FRANK EDELBLUT, in his Official Capacity as )  
Commissioner of the DEPARTMENT OF EDUCATION )  
("DOE"), CHRISTIAN KIM in his Official Capacity as the )  
Chair of the NEW HAMPSHIRE COMMISSION ON )  
HUMAN RIGHTS, and JOHN FOMELLA in his Official )  
Capacity as ATTORNEY GENERAL of the State of New )  
Hampshire. )

Defendants. )

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ANDRES MEJIA, )  
CHRISTINA KIM PHILIBOTTE, and )  
NATIONAL EDUCATION ASSOCIATION-NEW )  
HAMPSHIRE, )

Plaintiffs, )

v. )

FRANK EDELBLUT, in his official capacity only as the )  
Commissioner of the New Hampshire Department of )  
Education, )

JOHN M. FORMELLA, in his official capacity only as the )  
Attorney General of the State of New Hampshire, )

AHNI MALACHI, in her official capacity only as the )  
Executive Director of the New Hampshire Commission for )  
Human Rights, )

CHRISTIAN KIM, in his official capacity )  
only as the Chair of the New Hampshire Commission for )  
Human Rights, )

KEN MERRIFIELD, in his official capacity only as the )  
Commissioner of the Department of Labor, )

Defendants. )

Civil No. 1:21-cv-01077-PB

**PLAINTIFFS' JOINT RESPONSE TO NOTICE OF SUPPLEMENTAL  
AUTHORITY**

Plaintiffs jointly submit their response to Defendants' November 8, 2022 Notice of Supplemental Authority informing this Court of the First Circuit's opinion in *Frese v. Formella*, No. 21-1068. *Frese* is distinguishable. Unlike the Banned Concepts Act, the criminal defamation statute in *Frese* "adopts part of New Hampshire's common law defamation standard," and, in so doing, provides "guidance to law enforcement about the meaning of the statute." *See* Slip Op. at 10. The Banned Concepts Act contains no such limiting criteria that would aid those charged with that Act's enforcement. *See id.* at 10-11, 17. Nor does the Act contain a *mens rea* requirement, unlike the statute in *Frese*. *See id.* at 10 (noting the "requirement that the speaker know the statement to be false"), 11 (noting cases where laws "did not contain a requirement that the speaker know the statement to be false"), 17.

Further, unlike *Frese* where the plaintiff "offere[d] no hypothetical example of how a factfinder might struggle unduly" to apply the law in question, *see id.* at 10, such examples were presented here, including actual instances of excesses (e.g., mere non-classroom Petition signing, etc.). Further, just as the *Frese* Court highlighted district court decisions in addressing ambiguity, *see id.*, here two district courts in Florida and California have deemed vague laws similar to the Act. Indeed, just as the *Frese* Court called for "example[s] of how a factfinder might struggle unduly" with the challenged statutory language, *see id.*, these district court opinions make that point in invalidating the challenged language. Finally, *Frese*'s reference to the 1987 *Salerno* "no set of circumstances" standard, *see id.* at 8, is consistent with the standard set forth in *Johnson v. United States*, 576 U.S. 591 (2015), which effectively interpreted the *Salerno* framework. *Id.* at 603 ("If we hold a statute to be vague, it is vague in all its applications (and never mind the reality).").

Dated: November 9, 2022

Respectfully Submitted,

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